RECORD
AND
BRIEF

No. 15-1500

In the Supreme Court of the United States

BRIAN LEWIS, ET AL.,

Petitioners,

v.

WILLIAM CLARKE,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

BRIEF *AMICI CURIAE* OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, THE STATE OF TEXAS, THE STATE OF NEW MEXICO, THE STATE OF COLORADO, THE UTE MOUNTAIN UTE TRIBE, THE NAVAJO NATION, THE FORT BELKNAP INDIAN COMMUNITY, THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION AND THE CONFEDERATED SALISH AND KOOTENAI TRIBES IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

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INTERESTS OF THE *AMICI CURIAE*[1]

The National Congress of American Indians ("NCAI") is the oldest and largest national organization representing the interests of American Indians and Alaska Natives, with hundreds of tribal governments comprising its membership. Since 1944, NCAI has worked to protect the rights of Indian tribes and to improve the welfare of American Indians and also advised tribal, state and federal governments on a range of Indian issues, including issues of sovereign immunity.

The Navajo Nation, the Ute Mountain Ute Tribe, the Fort Belknap Indian Community, the Confederated Tribes of the Umatilla Indian Reservation and the Confederated Salish and Kootenai Tribes (collectively, the "Amici Tribes") are federally recognized Indian Tribes. The Navajo Nation is the largest Indian nation by land holdings, and, by some measures, the number of enrolled citizens. It has over 300,000 enrolled citizens and over 17 million acres of largely contiguous land in New Mexico, Arizona, and Utah. The Nation is larger than ten of the states and is roughly the size of West Virginia

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that no person or entity other than *amici curiae* and their counsel authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission of the brief. Amici States of Texas, New Mexico and Colorado file as of right under Rule 37(4). The parties were notified of the intention of amici curiae to file as required by Rule 37.2 and all parties have consented to the filing of this brief.

and twice the size of Massachusetts. The Nation is a sovereign government with two ratified treaties with the United States, entered into in 1850 and 1868. The Ute Mountain Ute Reservation also covers three states (Colorado, New Mexico and Utah) and some approximately 600,000 acres. The Confederated Salish and Kootenai Tribes reside on the Flathead Reservation covering 1.317 million acres across four counties in Montana, while the Fort Belknap Indian Reservation encompasses another approximately 650,000 acres in Montana and the Umatilla Indian Reservation includes approximately 175,000 acres in Oregon. Each of the Amici Tribes is a large land base tribe, with just the five Amici Tribes representing roughly 20 million acres of reservation land in five states. NCAI represents tribal interests on a national basis involving millions more acres of reservation lands.

The Amici Tribes rely on economic activities, such as gaming and mineral development, for virtually all of their governmental revenue and are located in geographically remote areas where their employees are frequently forced to drive long distances and across state lines on routine business. In terms of both territory and geography, tribes play significant governmental roles in our American federalism. These roles include weighing policy and making sovereign determinations – just as states do – as to whether and how the government manages litigation risk, both as to the government qua government and as to tribal employees. The Navajo Nation has a sovereign immunity act that provides a general waiver of sovereign immunity for tort claims, subject to certain limitations, Navajo Nation Sovereign Immunity Act, 1 N.N.C. §§ 551 *et seq.*, and the Ute

Mountain Ute Tribe frequently enters into agreements that provide waivers of sovereign immunity under specified circumstances, as do the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Salish and Kootenai Tribes and the Fort Belknap Indian Community. Tribes rely on having these waivers enforced as written, in accordance with their dispute resolution provisions and limits.

The States of Texas, New Mexico and Colorado are the "Amici States." Each of the Amici States, like their sister states, routinely interacts on a government-to-government basis with tribes resident in each state and also with tribes outside each state's borders. Their courts routinely enforce or domesticate tribal court judgments and work and coordinate in other ways with tribal judiciaries, to varying degrees. The State of New Mexico provides full faith and credit to tribal court judgments pursuant to state law. Forcing state courts to hear suits against tribal employees when those suits are forbidden by tribal law and the tribe has established an adequate alternative forum is detrimental to the Amici States' interest in developing a functioning relationship with tribal judicial systems, which are often the most appropriate forum to handle matters that are important to the Amici States and their citizens.

These dealings have resulted in numerous intergovernmental agreements, including frequently in the tribal gaming context. In that vein, the Amici States have reached binding agreements that each becomes incorporated into state law. These agreements frequently contain forum exclusivity clauses whereby tribal gaming authorities consent to suit in

a limited fashion, based on concerns similar to those weighed by state governments in determining whether and how to risk potential governmental liability. Each of the Amici States is interested in avoiding any displacement of such bargained-for settled expectations and likewise interested in avoiding the potential burden of litigation unrequired by state law.

The Amici, states and tribes, are united in their position that no policy interest is served by allowing plaintiffs to skirt—with mere pleading devices—carefully considered governmental limitations on suits against government employees, especially when those limitations have been negotiated and embraced in an intergovernmental agreement which constitutes state law. From the perspective of Amici, this is a federalism case, not a sovereign immunity case or an Indian law case. Instead, Amici assert the question presented here is more aptly framed: "Does federal law bar a state's highest court from determining its own jurisdiction and recognizing, as a matter of comity, an Indian tribe's sovereign immunity according to state rather than federal law?" The Amici submit the answer to that question must be "no."

Amici submit that every domestic government has the fundamental authority to control its own liability regime, as the Mohegan Tribe has done with respect to its gaming activities, in accord with the Tribe's compact with the State. In point of fact, the Mohegan Tribe has waived immunity for claims related to its gaming activities, including establishing a forum for relief and enacting statutes of limitation within which claims may be brought. *See* Mohe-

gan Tribe Code of Laws §§ 3-21 *et seq*. Below, Petitioners met neither the forum nor the statute of limitations requirements of Tribal law. Rather, they sought to displace the government's liability regime by dismissing their original untimely claims against the Mohegan Tribal Gaming Authority ("Tribal Authority") and recasting their claims as exclusively individual-capacity claims against the government employee who was undisputedly acting within the scope of his employment. Tort remedies would have been available to Petitioners if they had been appropriately filed. Petitioners' specter of tribal governmental employees running roughshod over non-Indians is a red herring. *Lewis v. Clarke* is a hammer in search of a nail, and has the potential to impose unfunded mandates upon state courts. A change to the status quo—e.g., creating access to state courts for individual-capacity claims against tribal employees otherwise only available in tribal courts—risks creating jurisdictional confusion where none now exists and burdening state courts with costs imposed by forum-shopping plaintiffs like Petitioners.

SUMMARY OF THE ARGUMENT

There is no principle of federal law that requires the courts of Connecticut to take jurisdiction over Petitioners' tort suit.

In the decision below, the Connecticut Supreme Court dismissed a suit against an employee of the Tribal Authority, correctly concluding that "the doctrine of tribal sovereign immunity extends to the plaintiffs' claims against the defendant because the undisputed facts of this case establish that he was an employee of the tribe and was acting within the

scope of his employment when the accident occurred." Pet. App 16a.[2] In reaching this result the Connecticut Supreme Court relied, appropriately, not only on federal cases but also on a Connecticut state case that applied the tort claim provisions of the Mohegan Gaming Code as an exclusive remedy because those provisions were part of the gaming compact approved by the State legislature, Pet. App. 11a (citing *Kizis v. Morse Diesel Int'l, Inc.*, 794 A.2d 498, 503-04 (Conn. 2002)), and on Connecticut's own sovereign immunity laws, which would extend immunity to a Connecticut State employee under similar circumstances. *Id.* at 15a (citing Conn. Gen. Stat. § 4-165) ("[n]o [S]tate officer or employee [of Connecticut] shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment.").

Whether or not this result is mandated by federal law, the Supreme Court of Connecticut has the authority to determine its own jurisdiction under Connecticut state law and to accord the Mohegan Tribe ("Tribe") the traditional comity owed to foreign and domestic governments. *See Nevada v. Hall*, 440 U.S. 410, 425 (1979) (finding that "one State's immunity from suit in the courts of another State is . . . a matter of comity," not a question of federal law).

Tribal immunity "is not subject to diminution by the States." *Kiowa Tribe of Oklahoma v. Mfg. Techs.*,

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[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed by Petitioner in this case. The opinion of the Connecticut Supreme Court (Pet. App. 1a-17a) is reported at 135 A.3d 677 (hereinafter "Decision Below").

Inc., 523 U. S. 751, 756 (1998). However, the states remain free to adopt an understanding of tribal sovereign immunity that is more expansive than that dictated by federal law, when considering the jurisdiction of their own courts. Tribal sovereign immunity in state court is not "solely a matter of comity," but that does not mean that comity plays no role at all. *Id.* at 755.

Allowing states to extend their recognition of tribal sovereign immunity beyond the minimum mandated by federal law is consistent with the history and policy of tribal sovereign immunity. The special status of tribal immunity in federal law derives from the fact that tribes were not parties to the Constitution and "were thus not parties to the mutuality of concession that makes the States' surrender of immunity from suit by sister States plausible." *Id.* at 756 (quoting *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 782 (1991)) (internal quotation marks omitted). Nonetheless, Indian tribes have become an important part of our federal system of government and have developed sovereign, intergovernmental relationships with the states.

The application of state comity doctrines and modern, statutory understandings of the scope of sovereign immunity is in keeping with tribes' roles in our legal system and with the establishment of mutually respectful relationships between state and tribal governments and court systems. It is also consistent with this Court's recent decision in *Franchise Tax Board of California v. Hyatt*, 136 S. Ct. 1277, 1282 (2016), which forbids states from discriminating against each other by refusing to accord

sovereign immunity to a defendant state when the forum state would have been immune under the same circumstances.

The Decision Below falls within the authority and jurisdiction of the courts of Connecticut, and there is no federal law that requires reversal.

ARGUMENT

I. THE JURISDICTION OF THE STATE COURTS IS A QUESTION OF STATE LAW, SUBJECT TO THE LIMITS IMPOSED BY FEDERAL LAW AND THE CONSTITUTION.

Petitioners argue that "[t]his Court has held that individual capacity damage actions . . . do not implicate sovereign immunity. . . . [but] [t]he Connecticut Supreme Court . . . created a different rule." Brief for Petitioners at 2. If so, then the Connecticut Supreme Court has acted within the scope of its authority, unless Petitioners can show that there is a federal rule of law that requires a different outcome. "Unless such a federal rule exists, we of course have no power to disturb the judgment of the [Connecticut] courts." *Hall*, 440 U.S. at 418.

This "different rule" created by the Connecticut Supreme Court is simply the rule that would have applied to Connecticut public employees in Connecticut court. *See* Conn. Gen. Stat. § 4-165; *Gordon v. H.N.S. Mgmt. Co.* 861 A.2d 1160, 1175 (Conn. 2004) (finding that a private operator providing bus services on a contract with the State could not be sued for a motor vehicle accident). Although the Connecticut Supreme Court based its decision primarily on federal cases, it observed that this approach, forbidding ordinary negligence suits against public employees, was also consistent with its own statutes

and the laws of other states. Pet. App. 14a-15a. Far from carving out special privileges for tribes, the Decision Below treats them with the same fairness and common sense that a state government would enjoy under similar circumstances.

The Decision Below is entirely consistent with this Court's explanation, which has endured some 126 years, that a government can choose to waive its sovereign immunity and "as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Hans v. Louisiana*, 134 U.S. 1, 17 (1890). Governments understandably limit immunity waivers, including as to public officials and employees, "to protect the public treasuries" and to enable "the government and its various subdivisions to function unhampered by the threat of time and energy consuming legal actions which would inhibit the administration of traditional state activities." *Garcia v. Albuquerque Pub. Sch. Bd. of Ed.*, 622 P.2d 699, 702 (N.M. App. 1981); *see also, e.g., Lister v. Bd. of Regents of Univ. Wisc. Sys.*, 240 N.W. 2d 610, 621 (Wisc. 1976) (listing multiple policy reasons for immunity). For more than a century, state courts have routinely followed that longstanding logic. As explained more fully below, there is nothing unusual about the way the Tribe has limited its governmental exposure via individual capacity actions by employees and moreover, nothing special about Connecticut's deference to the Tribe's establishment of the Mohegan Gaming Disputes Court as the exclusive forum for such claims.

A. Sovereign immunity of governments other than the United States in state court is a question of state law, unless there is a specific federal law that supersedes it.

Under this Court's precedents, the jurisdiction of the state courts, including the jurisdiction of the state courts over other states, their agencies, and their employees is a question of state law. *Hall*, 440 U.S. at 418. Under existing law, when a state is sued in the courts of a different state, "the matter must be determined in two spheres: Federal constitutional law, as to which, ultimately, the United States Supreme Court is the arbiter; and the concept of interstate comity, of which the forum state . . . is the arbiter." *Morrison v. Budget Rent A Car Sys., Inc.*, 230 A.D.2d 253, 264 (N.Y. 1997).

Thus, if a state accords to tribes the same comity that it accords to other states, in considering a motion to dismiss on tribal sovereign immunity grounds, the court must determine that hearing the case would violate neither federal tribal sovereign immunity law nor the laws of the state.

States have taken various approaches to the sovereign immunity of other states: some "have refused to accord sovereign immunity by way of interstate comity, stating simply that their own [s]tate interests favor the assumption of jurisdiction"; others "have declined to extend comity considering that their own statutes afford a lesser degree of immunity—a fuller level of compensation—than does the defendant"; and some employ a choice of law analysis and look at "which [s]tate has the more significant relationship to the parties and the action." *Morrison*, 230 A.D.2d at 267 (N.Y. 1997) (collecting cases).

Some of these approaches will need to be reevaluated in light of *Franchise Tax Board*, 136 S. Ct. at 1283.

What these different approaches have in common is that none of them look to whether the activity in question would have come within the scope of traditional, pre-statutory sovereign immunity as understood by English common law. Instead, courts analyze their own comity doctrines, along with the tort claim statute of the defendant sovereign. More often than not, states accord each other comity. As the State of Texas recently explained, this is because to do otherwise "would simply result in a race-to-the-bottom refusal to apply narrower foreign-state law, which in turn would only promote forum shopping." Brief in Chief for Eldo Frezza, M.D., at 32, *Montaño v. Frezza*, No. S-1-SC-35214 (N.M. Sept. 30, 2015) (case pending).

Reversing the Decision Below would force tribes into an 18th Century understanding of the relationship between sovereign immunity and respondeat superior that has been abandoned through statute by the federal government. Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563. Many states have also abandoned archaic views of individual capacity tort claims against government employees in favor of indemnification of employees and waivers of state sovereign immunity. *See* Brief for Petitioner at 19-20 (collecting state tort claims statutes).

Reversal would allow for an outmoded result even when a state is willing to accord sovereign immunity and the tribe has adopted a modern tort claims act that applies to the type of claim at issue. Mohegan Tribal Code, Ch. 3, Art. IV, §§ 3-245(a), 3-250(b). The outcome requested by Petitioners will only serve

to discourage tribes from adopting tort claims acts, because they would be forced to pay damages under the waiver of sovereign immunity but would not be able to provide any corresponding protections to their employees. The outcome would also result in forum-shopping, unnecessarily burdening state courts.

This outcome would also be inconsistent with the logic of *Franchise Tax Board*, where this Court held that a forum state must honor the defendant state's sovereign immunity laws up to the point where the forum state would be entitled to immunity under its own laws, to avoid evincing a "policy of hostility to the public Acts of a sister State." 136 S. Ct. at 1279 (citing U.S. Const., Art. IV, § 1 (Full Faith and Credit Clause)). "A constitutional rule that would permit this kind of discriminatory hostility is likely to cause chaotic interference by some [s]tates into the internal, legislative affairs of others." *Id.* at 1282. *Franchise Tax Board* is rooted in the Full Faith and Credit Clause, but its logic is consistent with the Congressional "policy of supporting tribal self-government and self-determination," *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985), that this Court has consistently applied to forbid a "policy of hostility to the public Acts" of Indian tribes. *Franchise Tax Board*, 136 S. Ct. at 1279. Petitioners would make this "discriminatory hostility" not only permissible, but mandatory, in state courts. In *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 760 (2002), this Court explained that the "primary purpose" of government immunity is to "accord States the dignity that is consistent with their status as sovereign entities." Thus, there is no apparent basis to require states to afford tribes, their fellow domestic sovereigns, less dignity.

B. Connecticut treated the Tribal Authority the same way that it would have treated an instrumentality of the Connecticut State government or another state.

Connecticut, like the federal government, requires suits for negligent actions by State employees to be brought against the State, not against the employee. Conn. Gen. Stat. § 4-165 ("No [S]tate officer or employee [of Connecticut] shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment."). The State specifically applies this rule to employees operating motor vehicles. "Any person injured in person or property through the negligence of any [S]tate official or employee when operating a motor vehicle owned and insured by the [S]tate against personal injuries or property damage shall have a right of action against the [S]tate to recover damages for such injury." Conn. Gen. Stat. § 52-556. "[I]n the absence of legislative authority we have declined to permit any monetary award against the [S]tate or its officials or agents." *Bloom v. Gershon*, 856 A.2d 335, 341–42 (Conn. 2004) (quoting *Krozser v. New Haven*, 562 A.2d 1080 (Conn. 1989)).

Connecticut will dismiss a suit against an employee of another state for an automobile accident in Connecticut if that other state provides a remedy that is sufficiently adequate and is not repugnant to the policies of the state, *Perrino v. Yeager*, No. 50 55 81, 1991 WL 204894, at *3 (Conn. Super. Ct. Sept. 27, 1991). Significantly, the Connecticut Supreme Court has held that by approving the Mohegan Tribe–State of Connecticut Gaming Compact, the Connecticut legislature has established that the tort

claims provisions of the Mohegan Gaming Code provide an adequate remedy. *Kizis*, 794 A.2d at 503-04.

When considering the exact question of whether a judgment against a motor vehicle operator (a private company contractor) ultimately operated against the state, the Connecticut Supreme Court found that "a judgment against the defendant would have the same effect as a judgment against the State" because "[a]s a practical matter, a declaratory judgment that the defendant was required to purchase uninsured and underinsured motorist insurance for the buses would require the State to provide such insurance for all State owned buses . . . . [and] [t]hat, in turn, could affect the State's decisions on how many buses to operate and where and how often to run them." *Gordon v. H.N.S. Mgmt. Co.*, 861 A.2d 1160, 1175 (Conn. 2004). To mandate a different rule would be to require Connecticut courts to adopt a less favorable understanding of sovereign immunity for tribes than they adopt for their own state employees.

The Decision Below, far from being a departure from standard principles of sovereign immunity, is a routine application of established principles. What Petitioners are seeking here is to force state courts to take jurisdiction contrary to their own laws and practices, without any constitutional or statutory basis.

C. Connecticut's approach is more in keeping with modern, statutory sovereign immunity law and better public policy.

Over the years, through the implementation of tort claims acts, the United States and most states have chosen to closely manage their potential gov-

ernmental liability and made determinations as to whether and in what circumstances immunity will be waived for the government and its employees. *See, e.g.*, 28 U.S.C. §§ 1346(b), 2671-2680. In waiving their immunity, governments balance competing interests, such as the social benefits of compensation for torts victims and incentivizing the service of public employees. *See, e.g., Ceja v. Lemire*, 154 P.3d 1064, 1067 (Colo. 2007) (Colorado provides this protection to government employees even though the legislature recognizes that "governmental immunity 'is, in some instances, an inequitable doctrine'") (quoting Colo. Rev. Stat. § 24-10-102); *see also* Richard H. Fallon, *Symposium: Official and Municipal Liability for Constitutional and International Torts Today Does the Roberts Court Have an Agenda?: the History and Policy of Officer Immunity in the United States: Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 485 (2011) (outlining strong policy grounds necessitating government employee immunity – namely the extensive social costs that such suits impose: "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'") (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)); *see also Bassett v. Mashantucket Pequot Museum and Research Center, Inc.*, 221 F.Supp.2d 271 (D. Conn. 2002) (cited in the Decision Below; holding that "[t]here is no basis for distinguishing between the actions of 'officials' or 'employees'" generally and that

"tribal immunity extends to all tribal employees acting within their representative capacity and within the scope of their employment").

Some governments narrowly tailor limited waivers of sovereign immunity for public entities and their employees, and only in certain circumstances. *See, e.g.* Colorado Governmental Immunity Act, Colo. Rev. Stat. § 24-10-106; Connecticut Claims Against the State, Conn. Gen. Stat. Ann. § 52-556; Georgia Tort Claims Act, Ga. Code Ann. § 50-21-20; New Mexico Tort Claims Act, N.M. Stat. Ann. § 41-4-4; North Dakota Claims Against the State, N.D.C.C. §§ 32-12.2-01; Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. tit. 5., ch. 101. Other governments offer broader waivers of sovereign immunity. *See, e.g.* Rhode Island Governmental Tort Liability Act., R.I.G.L. § 9-31-1; Washington Actions and Claims Against the State, R.C.W.A. § 4.92.090.

The Mohegan Tribe has waived immunity for claims related to its gaming activities, including establishing a forum for relief and enacting statutes of limitations within which claims may be brought. *See* Mohegan Tribe Code of Laws §§ 3-21 *et seq*. The forum is strikingly similar to that which Connecticut provides. Judges on the Mohegan Gaming Disputes Court are subject to the Connecticut Code of Judicial Conduct and the Connecticut Rules of Professional Conduct (except for Canon 5(F) of the Connecticut Code of Judicial Conduct, prohibiting judges from practicing law) and apply the General Statutes of Connecticut and Connecticut common law unless there is a specific tribal ordinance or regulation to the contrary. Mohegan Tribe Code of Laws §§ 3-24,

3-52. Just as Connecticut does, the Tribe also holds insurance coverage for claims against Tribal employees. Pet. App. 3a.

Like all governments, tribes must balance their need to provide appropriate recourse to people who have been injured by torts committed by their employees with the need to provide public services – a balance made more difficult by the fact that tribes are generally much smaller than states and have a very limited tax base, thus making it harder for them to self-insure against unexpected large liabilities. The approach taken by the Mohegan Tribe here, which provides a mechanism by which tort claimants can obtain relief, backed by insurance, is a sensible and increasingly popular approach to these problems. Tribal courts routinely handle tort cases pursuant to tribal laws wherein tribal governments have often created statutory waivers of their sovereign immunity. *See e.g.*, Navajo Nation Sovereign Immunity Act, 1 N.N.C. §§ 551 *et seq.* The essential point is that, regardless of the extent to which a government chooses to waive its immunity, the fact remains that it is a critical decision that must be reached by the government itself. *Hans*, 134 U.S. at 17.

There is no good reason to impose a national rule that prevents or discourages state courts from according comity to these tribal laws. If tribes find that these arrangements hold up in court and help them avoid dealing with the work-arounds, such as suing an employee in his personal capacity, that people use to attempt to avoid the implications of sovereign immunity, then more tribes may decide to

adopt appropriately tailored waivers of sovereign immunity in the future. Encouraging voluntary waivers of sovereign immunity, through enforcement, is the best way to provide recourse to future plaintiffs while at the same time according respect to tribal sovereignty.

In her concurring opinion, Justice Sotomayor stated that "both history and proper respect for tribal sovereignty – or comity" required the result in *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2041 (2014) (Sotomayor, J., concurring). The Decision Below is consistent with that vision of comity and Petitioners advance no reason why the State should be required to embrace the kind of asymmetry criticized by Justice Sotomayor in *Bay Mills*, e.g., by allowing state court suits against tribal employees that would be dismissed if brought against state employees. After all, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*," The Federalist No. 81, at 548 (Alexander Hamilton) (B. Cooke ed., 1961) (emphasis in original); *see also Sossamon v. Texas*, 563 U.S. 277 (2011) ("Immunity from private suits has long been considered 'central to sovereign dignity.'") (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

Instead, sound public policy strongly favors affirmance. States and tribes must make their own governmental judgments as to how best to manage competing policy interests, as well as the public's assets, in exercising the powers invested in them by their citizens. Governments cannot and should not be broken down into their constituent parts—the

people who carry out the work of the government—for tort liability purposes because to do so ignores the fact that ultimately, it is the public that makes decisions as to whether and how the government risks liability and the public which judges a government's dealings with other governments such as the Gaming Compact.

Additionally, Amici submit that "[s]overeign immunity principles enforce an important constitutional limitation on the power of the federal courts." *Sossamon*, 563 U.S. at 284 (citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984)). Although *Sossamon* and *Pennhurst State* were grounded in analysis of the Eleventh Amendment's proscription of federal court jurisdiction over suits against unconsenting states, the reverse is also true—federal courts lack jurisdiction to conscript state courts into hearing disputes that state law provides they need not, where, as here, exclusive jurisdiction lies elsewhere. To hold otherwise, the Court would allow plaintiffs' lawyers to trump the judgments of state governments and require state courts to open their doors to all comers who labeled their claims as individual capacity suits. The Constitution gives the Court no such authority, extending federal jurisdiction to "certain enumerated subjects only," and leaving "to the several [s]tates a residuary and inviolable sovereignty over all other subjects." The Federalist No. 39 at 256 (James Madison) (B. Cooke ed., 1961).

II. CONNECTICUT RECOGNIZES MOHEGAN SOVEREIGN IMMUNITY, AS CODIFIED IN THE MOHEGAN GAMING CODE, AS A STATE LAW OBLIGATION.

In the Decision Below, the Connecticut Supreme Court cites *Kizis*, 794 A.2d 498 for the proposition that "this court has also recognized that tribal immunity extends to individual tribal officers and employees acting within the scope of their authority." Pet. App. 11a. Although the Decision Below simply quotes *Kizis* without going into the reasoning behind the decision, *Kizis* was decided primarily on state law grounds, derived from the Mohegan Tribe–State of Connecticut Gaming Compact and Connecticut General Statute § 47–65b, not under federal principles of tribal sovereign immunity. *Kizis*, 794 A.2d at 504-05.

Kizis, like the present suit, involved a tort action against employees of the Tribal Authority. *Id.* at 500-01. The Connecticut Supreme Court found that, "[t]he exercise of jurisdiction by [S]tate courts in this type of action would be in direct contradiction to the procedures established and consented to by the [T]ribe after negotiation with the [S]tate of Connecticut and the federal government." *Id.* at 505. In negotiating and approving the Gaming Compact, Connecticut accepted the Mohegan Gaming Disputes Court 'exclusive forum for the adjudication and settlement of tort claims against the [T]ribe and its employees because it is the forum in which the sovereign has consented to being sued, as set forth in Ordinance No. 98–1 amending the Mohegan Torts Code." *Id.* at 505–06. *Kizis* reached this conclusion despite acknowledging that "Connecticut has a genuine interest in providing a judicial forum to

victims of torts," because the State and the Tribe negotiated and established the exclusive "manner in which to redress torts occurring in connection with casino operations." *Id.* at 505.

Petitioners originally pleaded claims against both the Tribal Authority and Respondent, only to drop their claims against the Tribal Authority in hopes that relabeling their action as an individual capacity action would let them skirt State law that expressly recognizes the exclusivity of the Mohegan Gaming Disputes Court. Pet. App. 3a, n. 2. The Court has long rejected such shenanigans in the sovereign immunity context, holding that to permit actions to proceed merely because a government employee is "named in his individual capacity, would be to adhere to an empty formalism" and thus undermine the principle of governmental immunity altogether. *Idaho v. Coeur d' Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997).

The application of *Kizis* to the Decision Below is straightforward and does not present a question of federal law.

III. THE SOVEREIGN IMMUNITY OF TRIBES IS NOT SUBJECT TO DIMINISHMENT BY THE STATES, BUT THIS IS A FLOOR, NOT A CEILING.

"[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the states." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891 (1986); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980); *Bay Mills Indian Commu-*

nity, 134 S. Ct. at 2031. Tribal sovereign immunity is distinct from that of the states and federal government, but as with all sovereigns, "[t]hat immunity . . . is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes*, 476 U.S. at 890. Only Congress, or a tribal government itself, may abrogate tribal immunity. *Bay Mills Indian Community*, 134 S. Ct. at 2038 ("Congress has continued to exercise its plenary authority over tribal immunity, specifically preserving immunity in some contexts and abrogating it in others"); *see also Kiowa Tribe*, 523 U.S. at 756.

Although the states may not diminish or abrogate Tribal sovereign immunity, the corollary is not true. *Bay Mills Indian Community*, 134 S. Ct. at 2041 (Sotomayor, J., concurring) ("Principles of comity strongly counsel in favor of continued recognition of tribal sovereign immunity, including for off-reservation commercial conduct."). The restriction on the diminishment of tribal sovereign immunity by the states derives from their status as pre-constitutional governments that "have not given up their full sovereignty." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id.* The states may not withdraw these aspects of sovereignty, but there is no apparent reason why they cannot and should not apply the same principles of comity to those standards that they apply to any other sovereign government. This is especially true where, as here, a tribe and a state have negotiated forum exclusivity as a

component of the inter-governmental compact between them.

Many states interact with tribal governments on a daily basis and have reached working arrangements that go beyond the minimum respect for tribal law and tribal sovereignty required by federal law. Indeed, today it is routine that state governments anticipate tribal governments' ability to limit their potential tort liability and negotiate important policy issues flowing from that reality on a government-to-government basis.

One example of this is in the gaming insurance liability context. When Oklahoma authorized casino-style gambling for Indian tribes within its borders, the State codified a model tribal compact. *See Shefer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 364 (Okla. 2013). This model compact includes provisions regarding liability insurance coverage for tribal casinos. 3A Okla. Stat. § 281. As a condition for conducting Class III gaming in Oklahoma, tribal casinos must provide a limited waiver of sovereign immunity to their patrons and purchase liability insurance with an endorsement preventing the insurer from asserting sovereign immunity. Likewise, California's general practice is to include provisions in its gaming compacts that require a limited waiver of sovereign immunity and insurance coverage. Correspondingly, California courts enforce precisely the language of a tribe's waiver of immunity, including any limitations set forth in tribal law. *Campo Band of Mission Indians v. Superior Court*, 137 Cal. App. 4th 175, 183, (2006), *as modified on denial of reh'g* (Mar. 20, 2006) ("If the tribe has

consented to suit, any conditional limitation imposed on its consent must be strictly construed and applied"); *see also for example, Crawford v. Couture*, 385 Mont. 350 (Mont. 2016) (affirming dismissal of individual capacity torts claims brought in state court against tribal police officer where such claims were not allowed in applicable inter-governmental agreement).

These mutual solutions to the challenges and policy choices presented by the fact of tribal sovereign immunity serve the public interest and are consistent with federal law.

* * *

CONCLUSION

The Connecticut Supreme Court held that it has no subject matter jurisdiction over this case. That decision is in keeping with Connecticut's tort claims laws, Conn. Gen. Stat § 4-165; *Bloom*, 856 A.2d at 341–42, the laws of the Tribe, Mohegan Tribe Code of Laws §§ 3-21 *et seq.*, the Gaming Compact negotiated between the Tribe and the State and authorized by Connecticut statute, *Kizis*, 794 A.2d at 504-05, and principles of interstate comity, *Franchise Tax Board*, 136 S. Ct. at 1279. These are all questions of state law that fall outside the jurisdiction of this Court. *Hall*, 440 U.S. at 418.

The Court should accordingly affirm the Decision Below.

Respectfully submitted,

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